Filed 5/30/19 Wiles v. Jackson CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

DESIREE WILES, Plaintiff and Appellant, v. WAYNE T. JACKSON, Defendant and Respondent.	D075079 (Super. Ct. No. MCC1400602)

APPEAL from a judgment of the Superior Court of Riverside County, Raquel Marquez, Judge. Affirmed.

Kyle Scott Law and Kyle J. Scott for Plaintiff and Appellant.

Konoske, Akiyama & Brust and Douglas V. Brust, D. Amy Akiyama and Megan K. Hawkins for Defendant and Respondent.

Plaintiff and appellant Desiree Wiles appeals from a judgment on a special verdict in which a jury found defendant and respondent Wayne T. Jackson not negligent following trial on Wiles's operative complaint for negligence and negligence per se. In that action, Wiles sought damages for personal injuries she suffered from a head-on

automobile collision with Jackson, who lost consciousness while driving his car to seek medical attention for a cut finger. She contends the trial court prejudicially erred by permitting Jackson to present a defense under the so-called "sudden emergency" doctrine, in which a person, acting without negligence on his or her part, is suddenly and unexpectedly confronted with imminent danger or the appearance of imminent danger. (*Leo v. Dunham* (1953) 41 Cal.2d 712, 714; see *Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 397.) Wiles further contends the jury's verdict is not supported by the evidence, which shows Jackson was negligent and caused the emergency by cutting his finger, which triggered his loss of consciousness and the ensuing accident. We reject these contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We state the facts from the trial evidence in the light most favorable to the jury's verdict, resolving all conflicts and indulging all reasonable inferences to support the judgment. (*Yale v. Bowne* (2017) 9 Cal.App.5th 649, 652; *American Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1459, fn. 1.)

On May 1, 2012, Jackson was at home using a pocket knife to try to remove a zip tie from a piece of equipment when he cut the second knuckle of his left pinky finger. Jackson wrapped his finger in several paper towels and applied pressure for about 20 minutes. His finger was painful and while he felt it was nothing to be alarmed about, he decided he needed medical attention. Jackson felt the injury was not urgent enough to call 911. He decided to drive to the hospital. Jackson did not think it would be difficult to drive there because "[i]t was just a cut" and he was able to use his injured hand to grip

things. He did not think to ask someone else to take him or call an ambulance, and he did not think about previous times he had passed out, including once while his blood was being taken.

Jackson got in his vehicle and drove down Murietta Hot Springs Road toward the hospital. While he was stopped at an intersection, the pain intensified. It was prime traffic at 6:00 in the evening and there were cars on the road to his sides and behind him. His hand and finger were painful and throbbing, his finger started to tingle and went numb, and he started feeling light-headed. Jackson remembered thinking, "Oh crap. I need to get off of the road." He admitted he probably could have put his car in park, but explained: "So the thing is, as I'm there and I'm light-headed, so I don't have—there wasn't necessarily time for me to stop and assess every single situation, 'All right, I could do this. What are the ramifications?' Blah, blah, blah. I could not—I couldn't assess every situation and decide what was the best solution to do, nor could I have really have anticipated the thought, 'I should probably get off of the road' was going to be my last conscious thought until after the accident." According to Jackson, he had no time to act on any kind of measure that would have kept the car from going where it went.[1] His next memory was "[t]he world was white and I was being buffeted around."

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1 Jackson testified: "[T]here was nothing like, 'What am I going to do now?' There was not even time for me to think, 'How am I going to get off the road,' really. I knew there was a spot over here, and I needed to get off of the road, and there's like this area over on the right side of the road, but there's another vehicle, and that was kind of it. There wasn't time for me to do anything."

Jackson's vehicle went through a guardrail at the I-215 northbound on-ramp, traversed an embankment, then travelled perpendicular to the northbound I-215 lanes, going south in the number 1 lane, where it collided with Wiles's vehicle.

California Highway Patrol Officer Randall Cooper, who was retired at the time of trial, spoke with Jackson as part of his accident investigation and recorded Jackson's statements at the scene. According to the officer, Jackson related that he had felt faint, his hand or arm was going numb, and he blacked out at the traffic light. Jackson admitted that he should have pulled his car over. Jackson also related that he experienced fainting issues after seeing blood. Office Cooper explained that his notes of Jackson's statement were "close, but . . . not verbatim." Jackson gave a similar description to emergency room staff, who wrote that Jackson "admit[ted] to, []quote, 'vasovagal,' quote, []event before when blood was being drawn."[2] The emergency room physician noted that Jackson "reports syncope," which is a general term to describe passing out. He wrote that Jackson " 'has [a] history of vasovagal syncope when he sees blood.' " The doctor

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2 In a videotaped deposition presented to the jury, the emergency room physician who treated Jackson following the incident read from records documenting Jackson's complaints to staff: " 'Patient was brought in by ambulance after he passed out while driving a car wearing a seat belt. Positive air bags. Patient complained of mild posterior neck pain, diffuse, and left pinky finger pain, as he cut it with a knife and states there was a lot of bleeding. Patient remembers driving to the emergency department when he felt numbness in finger, then hand and left arm, and then remembers feeling dizzy and lightheaded and tried to pull off the freeway. Patient admits to,[] quote, 'vasovagal,' quote, []event before when blood was being drawn." Construing this testimony in the light most favorable to Jackson, we read the staff's use of the term "vasovagal" as documenting Jackson's description of the event in medical terms of their own, not as a verbatim note of what Jackson said.

advised Jackson it would be unsafe to get behind the wheel of a car and drive in the future if he experienced the same situation. Thus, the doctor noted that Jackson was " '[a]ware he should not drive if he has an injury in the future.' "

Wiles sued Jackson, eventually filing a second amended complaint alleging causes of action for negligence and negligence per se. The matter proceeded to a jury trial. Before trial, Jackson filed a brief on the defense of "sudden incapacity" under *Bashi v. Wodarz* (1996) 45 Cal.App.4th 1314, arguing he was entitled to a verdict in his favor if he could prove he had no reason to anticipate he would suddenly be stricken by an illness that would render it impossible for him to operate his car. Wiles moved to prevent Jackson from asserting defenses based on sudden emergency or sudden illness. She argued the evidence was uncontroverted that Jackson caused the emergency or illness by cutting his finger, which caused the throbbing pain that led to his loss of consciousness. Pointing to some of Jackson's medical records reflecting past periods of unconsciousness, Wiles argued Jackson had reason to anticipate he could lose consciousness due to pain, a stressful event, or the sight of seeing or losing blood. According to Wiles, Jackson could not claim the loss of consciousness was unanticipated and not caused or contributed to by his own negligence.

During discussion of the special verdict, the court and the parties addressed whether the court should instruct the jury with CACI No. 452 pertaining to the sudden emergency doctrine. Jackson's counsel argued the instruction did *not* apply, pointing out the doctrine required a sudden emergency presenting the defendant with a choice of action. He argued under the circumstances Jackson had no choice and no opportunity to

pick an option because he fainted. The court remarked that whether the emergency was "sudden and unexpected" could be argued both ways, observing Wiles's counsel would argue the instruction did not apply because Jackson cut himself, but that there was evidence that it was the syncope, a reflex, that caused the fainting, which Jackson did not bring about. Jackson's counsel argued that a "sudden medical emergency" was a complete defense to negligence, and proposed an instruction stating that Jackson contended he was not negligent, and to prove that, he "must prove . . . [t]hat he was suddenly stricken by an illness while driving an automobile which rendered it impossible for him to control the car . . . ." He proposed that the verdict form simply ask whether Jackson was negligent. The court responded, "So that is fine, and . . . you can go that direction, too. So, was the defendant negligent? And then you argue it and you say, if there's medical necessity [*sic*], the answer to that is no. If there's no medical necessity [*sic*], the answer is yes." Wiles's counsel then asked for a directed verdict on causation, and after further discussion the parties agreed the verdict form would ask only whether Jackson was negligent and if yes, what were Wiles's damages.

At trial, counsel read into the record Jackson's discovery admission that he had previously lost consciousness "under markedly different circumstances." Jackson, a retired Marine, was asked about those prior episodes and recounted them, including an incident in 1999 when he passed out while having multiple vials of blood drawn.[3]

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[3] Jackson testified he was hit in the head by his brother at age five or six, but had no memory of losing consciousness. In 1993, when he filled out his Marine Corps application, he had reported periods of unconsciousness. He told the doctor at that time

Jackson testified that after 1999, he was never diagnosed with a condition that prompted him to pass out. Between 1999 and the car accident he did not pass out at the sight of blood, even though he had about 20 other laboratory blood draws, and during his military career there were situations where he saw blood without incident.

Wiles presented testimony from Dr. Ronald Oudiz, a cardiologist, who was asked whether he had reached conclusions about Jackson passing out on the day in question. He responded: "I was unable to conclude definitively as to the etiology of the passing out. I was able to determine that there were accounts by the defendant, by the emergency room, and by the officers that were at the accident scene that things happened, but there—I don't believe there were any . . . further bits of information that helped me determine anything beyond that." Dr. Oudiz clarified that the term etiology meant the "cause." Dr. Oudiz agreed that seeing blood "can be" a trigger for a vasovagal episode. He was asked to relate Jackson's deposition testimony about what occurred before he passed out; the doctor stated, "I believe the main complaint which caused him to think that there was something that was going to happen was a result of the cut he had on his

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that he had passed out a few seconds after heavy exertion, recalling he was 15 or 16 when that occurred. His report did not prevent him from being accepted into the Marine Corps. In 1999, Jackson received an abnormal laboratory result for his liver requiring that he have seven to eight vials of blood drawn, and he passed out while looking at the blood. In February 2001, Jackson was ejected from a horse and landed on his tailbone, causing him to become dizzy and then pass out. He later told a physician that he was unconscious for 10 minutes, but nothing of a medical nature limited his Marine Corps duty and no healthcare provider warned him he should not do certain things because he might pass out. Nothing kept him from gaining promotions between 1999 and 2001. In 2008, Jackson was again bucked off a horse, resulting in back pain and dizziness. He underwent a CT scan as a result of that incident, but he was not placed on any work or military duty restriction as a result. At that time, Jackson was able to pass a physical fitness reenlistment test even though he had three cracked ribs.

finger." He related that the cut caused bleeding and pain, and agreed that pain is also a trigger for vasovagal episodes.[4] Wiles's counsel asked Dr. Oudiz, "What was the first thing that occurred regarding Mr. Jackson that day that put this whole process in motion?" Dr. Oudiz answered: "The cut on the finger." The doctor stated that after that event, the type of symptoms suffered by Jackson relevant to his analysis was the "pain and blood in the finger" as reported by police.

Jackson presented the testimony of an internal medicine specialist expert, Scott Carstens, M.D., who reviewed Jackson's medical records with respect to his condition on the day of the incident, and Jackson's military records from 1993 to 2014. Dr. Carstens described vasovagal syncope as a "reflex-oriented syncope to some sort of stimulus or provocative event." He explained that the condition was a "reflex brain problem or issue where there's some stimulation and the brain responds in a kind of inappropriate way"; "sometimes there's warning, sometimes there's not"; and a person experiencing such an condition can "all of a sudden" lose consciousness. According to Dr. Carstens, the

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[4] Dr. Oudiz was asked whether Jackson's medical records affected his opinion as to whether Jackson had vasovagal syncope. Dr. Oudiz responded: "It's a difficult question to answer simply, mainly because, as I mentioned, first of all, the term vasovagal syncope is a syndrome and it can be multiple different mechanisms. It can be multiple situations, multiple triggers, and multiple clinical presentations, the way it evolves and occurs. [¶] In the end, vasovagal syncope, certainly with a single event, is a diagnosis that, using the history of the patient and the history of the event as the accounts are given, preferably with witnesses in addition to the individual themselves—the more information we have, the better. Plus, the findings, if any, on a physical examination and the findings, if any, with a lab test. So in the end, it is a compilation or a gathering of as much evidence as you can get with a tentative final diagnosis, if you will, of what you think it is likely to be."

condition had a wide variety of triggers, including a traumatic emotional event, fear or injury.

Dr. Carstens observed that Jackson's medical records and deposition testimony indicated he had become unconscious on three occasions, one of which was not corroborated by a medical exam. The first episode was when Jackson fainted during football practice in Oklahoma. The second was the 1999 incident when Jackson lost consciousness while a number of vials of blood were being drawn from him, after a physician told Jackson that he had a serious liver injury. In 2001, Jackson fell off a horse and suffered loss of consciousness. In 2008, Jackson again fell off a horse, injuring his tailbone, and felt woozy. Someone had written on an X-ray record, "loss of consciousness" but the doctor found no record of that. According to Dr. Carstens, the records of that incident did not mention any vasovagal condition that would affect Jackson's ability to continue in the Marine Corps. Dr. Carstens found nothing in any of the military medical records indicating that Jackson had been diagnosed with fainting at the sight of blood, or that he fainted at the sight of blood. Nor did Dr. Carstens find any reference in those records to problems with vasovagal episodes; the records did not contain a diagnosis of any ongoing condition of vasovagal syncope. The doctor found no evidence of safety-related restrictions on Jackson's military activity as a result of his history.

Dr. Carstens's opinion was that Jackson lost consciousness as a result of a vasovagal episode due to the circumstances of his injury and the pain, and it was not an event that Jackson could have anticipated. He testified that someone who faints typically

is unable to control his actions. According to Dr. Carstens, none of the medical records he reviewed would have made Jackson aware of any predisposition to vasovagal syncope.

Testifying in his own defense, Jackson was asked whether there was any way he could have anticipated he was going to pass out at the intersection. He responded: "For the life of me, I cannot fathom how I could have known this was going to happen. There was nothing—even in my medical records, there's nothing that says vasovagal syncope, or however you're supposed to pronounce it. The only reason—the only reason we know about what happened in 1999 is because I told everyone about it."

The court instructed the jury with CACI No. 452, which provided: ". . . Jackson claims that he was not negligent because he acted with reasonable care in an emergency situation. [¶] . . . Jackson was not negligent if he proves all of the following: [¶] 1. That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury; [¶] 2. That . . . Jackson did not cause the emergency; and [¶] 3. That . . . Jackson acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer."[5]

The jury returned a special verdict, answering "no" to the question, "Was Wayne T. Jackson negligent?" Wiles unsuccessfully moved for judgment notwithstanding the

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5 The court's reading of the jury instructions was not reported. While the record contains the parties' joint jury instruction list, that list does not indicate which instructions were given. The record does not contain the full set of instructions read to the jury.

verdict and a new trial. She appeals from the judgment and the order denying judgment notwithstanding the verdict.

DISCUSSION

I. *The Sudden Emergency Doctrine*

The sudden emergency doctrine, also referred to as the doctrine of "imminent peril," rests on the theory that "a person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in exercise of ordinary care in calmer and more deliberate moments." (*Leo v. Dunham*, *supra*, 41 Cal.2d at p. 714; see also *Shiver v. Laramee*, *supra*, 24 Cal.App.5th at p. 397; *Pittman v. Boiven* (1967) 249 Cal.App.2d 207, 216; *McShane v. Cleaver* (1966) 247 Cal.App.2d 260, 268 [sudden emergency "applies where a nonnegligent person is confronted with a situation of imminent danger to himself or to others, in which case he is not required to exercise the same standard of care otherwise required"].) " 'The doctrine . . . is properly applied only in cases where an unexpected physical danger is presented so suddenly as to deprive the driver of his power of using reasonable judgment. [Citations.] A party will be denied the benefit of the doctrine of imminent peril where that party's negligence causes or contributes to the creation of the perilous situation." (*Boiven*, at p. 216.)

Cases where the premise is applicable " 'involve situations where at least two courses of action are present after the danger is perceived . . . .' " (*Staggs v. Atchison, Topeka & S.F. Ry. Co.* (1955) 135 Cal.App.2d 492, 502-503, italics omitted, quoting

Perry v. Piombo (1946) 73 Cal.App.2d 569, 572; see *Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 675; *Christensen v. Bergmann* (1957) 148 Cal.App.2d 176, 185; *Connor v. Pacific Greyhound Lines* (1951) 104 Cal.App.2d 746, 757.) Thus, the doctrine was implicated where a defendant testified that when she saw the plaintiff's car coming fast through an intersection she " 'stepped on [her] brakes and swerved to the right to possibly get out of his way,' " and that she "did the best she could in the split second that she had to act . . . ." (*Grinstead v. Krushkhov* (1964) 228 Cal.App.2d 793, 794-795.) Had the defendant swerved to her left rather than the right, she might have avoided the collision and nothing prevented such an action, and "[s]he thus had a choice of which course to take." (*Id.* at p. 795.) Evidence supported instructing on the doctrine where the defendant driver, who did not see pedestrians until they poked their heads out from beyond the front of another vehicle and ran out in front of him, "could have sounded his horn, or swerved sharply to the left, or to the right, or relied upon his brakes alone, or done a combination of these things to avoid the collision or lessen the probability of striking the plaintiff." (*Christensen*, at p. 185.) Likewise, where a driver could have applied his brakes or swerved to the right, the evidence justified an imminent peril instruction. (*McHale v. Hall* (1967) 257 Cal.App.2d 342, 345, 349.) But where the defendant "took the only course of action available" when confronted with another car and did not testify about "alternative courses of action available to her" or "choosing one of two available courses of action," the doctrine was held not implicated. (*Anderson v. Latimer, supra*, 166 Cal.App.3d at p. 675.) And the doctrine was held inapplicable where a train hit a toddler on the tracks ahead and the only railroad employee who first saw the

boy had no control of either the train whistle or brakes when the train was about 20 or 30 feet away. (*Staggs v. Atchison, Topeka & Santa Fe Ry. Co.*, at p. 502.) In that case, the jury instruction for imminent peril was inapplicable since the record was "without conflict that defendant's agents, after [the boy's] peril was observed, could not have avoided the accident or in any manner have lessened his injuries." (*Id*. at p. 503.)

"Whether the conditions for application of the imminent peril doctrine exist is itself a question of fact to be submitted to the jury." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37 [holding jury could reasonably conclude the conditions for application of the doctrine existed for purposes of assessing the propriety of the court's giving of a jury instruction on the doctrine]; *Leo v. Dunham*, *supra*, 41 Cal.2d at p. 715; *Pittman v. Boiven, supra,* 249 Cal.App.2d at p. 216.)

II. *Claim of Instructional Error*

Wiles contends the trial court erred by instructing the jury with CACI No. 452 as to the sudden emergency doctrine because Jackson did not meet the requirements for its use. Specifically, Wiles maintains the evidence, including the medical expert testimony, was uncontroverted that Jackson caused or contributed to the emergency, and there was no evidence Jackson after perceiving the danger was presented with two courses of action that he could take. She argues the error was prejudicial; that if she had been allowed to present her case without the defense, there was "reasonable chance" or "reasonable probability that the jury would have seen the entire case differently."

A. *Standard of Review*

We apply the following settled principles regarding jury instructions. "A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him which is supported by substantial evidence." (*Soule* v. *General Motors Corp.* (1994) 8 Cal.4th 548, 572 (*Soule*); *Eng v. Brown* (2018) 21 Cal.App.5th 675, 704.) "Parties have the 'right to have the jury instructed as to the law applicable to all their theories of the case which were supported by the pleadings and the evidence, whether or not that evidence was considered persuasive by the trial court.' " (*Maxwell v. Powers* (1994) 22 Cal.App.4th 1596, 1607.) Where, as here, a party claims the sudden emergency instruction was improperly given, we view the evidence in the light most favorable to Jackson (*Freeze v. Lost Isle Partners* (2002) 96 Cal.App.4th 45, 53), and look to whether there was substantial evidence that would permit a reasonable jury to conclude the conditions warranting the instruction existed. (See *Damele v. Mack Trucks, Inc.*, *supra*, 219 Cal.App.3d at p. 37; *McShane v. Cleaver*, *supra*, 247 Cal.App.2d at pp. 268-269; *McDevitt v. Welch* (1962) 202 Cal.App.2d 816, 823 [in considering whether to give imminent peril instruction in favor of a plaintiff, "a question arises as to whether, under plaintiff's theory of the case, there was evidence from which the jury could reasonably have inferred that plaintiff was without negligence on his part when he was confronted with the emergency"].) "It is improper to give an instruction on sudden peril unless the litigant is suddenly and unexpectedly faced with a danger and to avoid that danger, took action which resulted in injury." (*Thompson v. Keckler* (1964) 228 Cal.App.2d 199, 213.)

Further, instructional error in a civil case is not ground for reversal unless it is probable the error prejudicially affected the verdict, resulting in a miscarriage of justice. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 983; *Soule*, *supra*, 8 Cal.4th at p. 580; *Guernsey v. City of Salinas* (2018) 30 Cal.App.5th 269, 282; *Wallace v. County of Stanislaus* (2016) 245 Cal.App.4th 109, 132; *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 656; *Biggar v. Carney* (1960) 181 Cal.App.2d 22, 32-33 [erroneous failure to give imminent peril instruction at defendant's request was not a miscarriage of justice where substantial evidence supported the jury's finding of defendant's negligence].) A miscarriage of justice occurs if it is reasonably probable that the appealing party would have obtained a more favorable result had the instructional error not occurred. (*Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 476; accord, *Wallace v. County of Stanislaus*, at p. 132; *Green v. County of Riverside* (2015) 238 Cal.App.4th 1363, 1371.) In determining whether instructional error was prejudicial, a reviewing court "should consider not only the nature of the error, 'including its natural and probable effect on a party's ability to place his full case before the jury,' but the likelihood of actual prejudice as reflected in the individual trial record, taking into account '(1) the state of the evidence, (2) the effect of other instructions, (3) the effect of counsel's arguments, and (4) any indications by the jury itself that it was misled.' " (*Rutherford v. Owens-Illinois, Inc.*, *supra*, 16 Cal.4th at p. 983.)

B. *Substantial Evidence Supported Giving the Imminent Peril Instruction*

As stated, the question presented by Wiles's claim of instructional error is only whether, viewing the evidence in the light most favorable to Jackson, there were facts on which the jury could conclude the doctrine of sudden emergency or imminent peril applied. Concededly, this case is somewhat unique because the emergency or peril to which Jackson assertedly reacted was a medical event: his loss of consciousness while driving, not another vehicle coming at him or a person in the road, as is typical in cases dealing with the issue. (See *Leo v. Dunham*, *supra*, 41 Cal.2d 713-715 [sudden emergency presented by person crossing a highway who failed to yield right of way to driver]; *Biggar v. Carney*, *supra*, 181 Cal.App.2d at pp. 25-26 [collision between automobile and pedestrian crossing a boulevard]; *Grinstead v. Krushkhov*, *supra*, 228 Cal.App.2d at pp. 794-795 [two-automobile collision]; *McShane v. Cleaver*, *supra*, 247 Cal.App.2d at p. 263 [same]; *McDevitt v. Welch*, *supra*, 202 Cal.App.2d at pp. 818-819 [same]; *McHale v. Hall*, *supra*, 257 Cal.App.2d at p. 349 [same, rear end collision].) Wiles does not argue the absence of such a sudden emergency, only that Jackson's negligence contributed to it happening, or Jackson was not presented with a choice of action when faced with it.

We reject Wiles's contention that the evidence is uncontroverted as to Jackson causing or contributing to the emergency. She maintains the medical experts, Dr. Carstens and Dr. Oudiz, "all agreed" that Jackson suffered the vasovagal syncope as a result of the self-inflicted cut to his finger and the resulting pain. She argues Jackson thus contributed to the perilous situation, making it improper to give the instruction.

The question is not whether any act of Jackson's contributed to or caused the emergency, but whether his *negligent* act did so. (*Shiver v. Laramee*, *supra*, 24 Cal.App.5th at p. 399 ["A party will be denied the benefit of the doctrine of imminent peril where that party's negligence causes or contributes to the creation of the perilous situation"]; *Pittman v. Boiven*, *supra*, 249 Cal.App.2d at p. 216.) Ordinary negligence "consists of a failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 753-754.) "Whether the one seeking to invoke the [imminent peril] doctrine was free of negligence is ordinarily a question of fact for the jury. Where the evidence would support a finding that he was not negligent and the conditions for the applicability of the doctrine are otherwise met, he is entitled to the instruction." (*Philo v. Lancia* (1967) 256 Cal.App.2d 475, 482.)

We cannot say as a matter of law that the evidence shows negligence on Jackson's part caused or contributed to the emergency, precluding application of the imminent peril doctrine and the giving of a corresponding jury instruction. Rather, there is substantial evidence to the contrary warranting the instruction. Jackson presented evidence from which the jury could determine that the sudden and unexpected emergency was him losing consciousness while driving, which was the result of vasovagal syncope, a condition that Dr. Carstens testified was a *reflex* that Jackson could not have controlled or anticipated. Based on Dr. Carstens's testimony, a jury could conclude that the reflex occurred due to a *stimulus* (pain or injury) brought about by Jackson cutting himself with his knife, but the jury could reasonably decide that Jackson's act in injuring himself was

an accident, not a negligent act. " '[E]very mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care, and whether such mistakes constitute negligence, is a question of fact.' " (*Minnegren v. Nozar* (2016) 4 Cal.App.5th 500, 508.) A sudden emergency was not presented by the mere fact that Jackson cut his finger. The jury could also conclude that Jackson was not negligent for deciding to drive after cutting his finger, as Jackson testified he was able to grip with his injured hand and the cut was not serious enough to require an ambulance, and Dr. Carstens testified that nothing in Jackson's medical record indicated repeated episodes of vasovagal syncope or any other condition that would have put Jackson on notice that he might pass out due to his injury while driving. Jackson testified he "[could not] fathom" how he could have known he would have an episode of vasovagal syncope, as nothing in his medical records mentioned that condition. The question of whether Jackson breached a duty to exercise due care and thus acted negligently was within the province of the jury (see *Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 32; *Minnegren v. Nozar*, at p. 507), and the jury plainly decided that issue in Jackson's favor by its no negligence verdict. Substantial evidence in this record would permit the jury to determine that Jackson "acted as a reasonably careful person would have acted in similar circumstances . . . ." (CACI No. 452.)

We further reject Wiles's argument that the instruction was not warranted because there is no evidence Jackson had two courses of action to take after he perceived the danger. Though this is a closer question, we again conclude substantial evidence on this

point would permit a reasonable jury to conclude that was the case. Jackson testified about the circumstances at the time he began to feel light-headed while in his vehicle:

"[Wiles's counsel:] [W]hen you were feeling this light-headedness, your vehicle is at a stop; right?

"[Jackson:] Yes.

"[Wiles's counsel:] Would you have been able to put your car in park at that time?

"[Jackson]: *Probably*.

"[Wiles's counsel:] Okay. When you felt this light-headedness, did you think that you're about to pass out?

"[Jackson:] I didn't know.

"[Wiles's counsel:] When you felt this light-headedness, were you fearful you were going to pass out?

"[Jackson:] I don't remember.

"[Wiles's counsel:] When you felt this loss of consciousness or light-headedness, did you think you needed to move your car from the position that it was at?

"[Jackson:] *I remember thinking I needed to get off of the road*.

"[Wiles's counsel:] Okay. And why would you need to get off of the road?

"[Jackson:] I was concerned about the fact I was light-headed."[6] (Italics added.)

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6 Jackson further testified that he could not recall how long he was feeling that he was losing his ability to control his vehicle. Jackson confirmed he was the first car in the number 2 lane at the intersection lane of the road. In response to counsel's questions, he stated he could not remember concluding he should pull to the right, but said, "That seems logical to me that would be my conclusion." After Jackson thought he needed to

This testimony permits a reasonable jury to conclude that when he started to feel light-headed or faint, Jackson "had open to him a choice of [at least two] courses of action" (*Christensen v. Bergmann*, *supra*, 148 Cal.App.2d at p. 185), that is, he could have put his car in park, or he could have moved his car off the road to avoid the peril of losing consciousness while actively driving. A jury could find on this evidence that Jackson elected not to put his car in park but to proceed to get off the road, then passed out after making that choice. Under these circumstances, "[w]hether [Jackson] was negligent in not selecting the best or safest of these courses in the face of the emergency was for the jury to decide." (*Ibid.*)

We concede that while being questioned by his own counsel, Jackson testified that he did not anticipate his thought, " 'I should probably get off of the road' was going to be my last conscious thought until after the accident" and that he had no time to act on any kind of measure that would have kept the car from going where it went. The question we are presented with is only whether there is substantial evidence to support the court's giving of the sudden emergency instruction, and Jackson's testimony that he probably could have put his car in park or needed to get off the road is credible evidence of solid value in itself to give the instruction, regardless of Jackson's other testimony. The record thus presented a jury question as to whether the doctrine applied, requiring us to conclude the instruction was properly given.

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get off the road, his next memory was "[t]he world was white and I was being buffeted around."

Wiles points to Jackson's counsel's characterization of the evidence at the time he initially argued against giving the sudden emergency instruction. It is our role to independently review the record for substantial evidence to support the court's decision to give or not give instructions. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217; accord, *Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1182 [substantial evidence review in context of assessing denial of motion for JNOV].) We need not adopt Jackson's counsel's view, which is mere argument, not evidence, no matter how extensive or vigorously made at the hearing. (*In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11; *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1433.)

C. *Any Error in Giving the Instruction was Harmless*

Even if we were to conclude there was no set of facts in the record to support the doctrine of sudden emergency for purposes of instructing the jury, we would conclude based on the entire cause, including the evidence, Wiles has not shown the court's reading of the jury instruction resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *Soule, supra*, 8 Cal.4th at p. 574.) The circumstances here are the same as in *Damele v. Mack Trucks, Inc.*, *supra*, 219 Cal.App.3d 29, where the court explained "[t]he instruction permitted the jury to apply the imminent peril doctrine, but did not require that it do so. The instruction indicates on its face that the doctrine applies only to those who did not cause or contribute to the imminent peril. If the question were as clear as [Wiles] claims it is, then it follows that the jury would have found the doctrine inapplicable. In these circumstances, it is not reasonably probable that the jury would

have reached a different verdict had the trial court not given the instruction." (*Damele v. Mack Trucks, Inc.*, at p. 37.)

Further, Wiles has not demonstrated the jury was confused by the instruction, or that it necessarily contributed to their verdict to the exclusion of any other theory by which the jury could have found Jackson acted as a reasonably prudent person. (See, e.g., *Myers v. Carini* (1968) 262 Cal.App.2d 614, 620 [error in giving instruction on imminent peril harmless where there was no indication "the jury was confused by it, or that the instruction contributed in any way to the final verdict"].) Wiles argues only that if she had been allowed to present her case without the sudden emergency defense, "the jury would have seen the entire case differently." To the extent she addresses the degree of conflict in the evidence on critical issues, her assertion that both experts agreed Jackson's pain caused his loss of consciousness mischaracterizes the record, and ignores Dr. Carstens's testimony that the cause was a reflexive condition that Jackson could not anticipate or control. Wiles does not address whether Jackson's counsel's argument to the jury may have contributed to any misleading effect of the instruction; whether the jury requested a rereading of the erroneous instruction or related evidence; the closeness of the jury's verdict; or the effect of other instructions on any claimed error. (*Soule, supra,* 8 Cal.4th at pp. 570-571; *Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 743; *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 300.) Her argument is not enough to convince us that absent the sudden emergency instruction, it was reasonably probable the jury would have made a different finding as to negligence. (*Soule*, at p. 574.)

Finally, we conclude the jury could have determined Jackson was not negligent on other evidence appearing in the record, namely, the fact he suffered a sudden and unexpected loss of consciousness from a medical condition that substantial evidence in the record establishes he could not control or anticipate. When a driver is suddenly stricken by an illness that he had no reason to anticipate, rendering him unconscious, he is not chargeable with negligence. (*Bashi v. Wodarz*, *supra*, 45 Cal.App.4th 1314, 1319 [declining to extend rule to sudden mental, as opposed to physical, illness]; *Ford v. Carew & English* (1948) 89 Cal.App.2d 199, 203-204 [upholding jury verdict in defendant's favor where defendant without warning lost consciousness due to strained heart muscles; the jury could believe the defendant's version based on contradictory evidence that he could not anticipate suddenly fainting]; *Waters v. Pacific Coast Dairy, Limited Mut. Compensation Insurance Co.* (1942) 55 Cal.App.2d 789, 792; accord, *Hammontree v. Jenner* (1971) 20 Cal.App.3d 528, 530-532 [upholding jury verdict in defendant's favor where defendant became unconscious during an epileptic seizure and lost control of his car; the driver had a medical history of epilepsy but had controlled his condition for about 12 years through medication and he "had no inkling or warning that he was about to have a seizure prior to the occurrence of the accident"]; *Zabunoff v. Walker* (1961) 192 Cal.App.2d 8, 11 [jury could conclude there was no negligence on the part of defendant who had complied with a yield sign and was exercising due care, but then sneezed, preventing him from seeing the plaintiff's car; "[s]ince a sneeze is a reflex action which could not necessarily be anticipated by a reasonably prudent person, the jurors could have concluded that the sneeze was an intervening cause similar to a fainting

spell and that no negligence on the part of respondent was thus established"].) Here, the court's instruction on sudden emergency told the jury that they could not find Jackson negligent if he proved a sudden and unexpected emergency situation that he did not cause (here, his loss of consciousness), and he acted as a reasonably careful person in similar circumstances, even if a different course of action (i.e., calling an ambulance) would have been safer. The facts warranted the jury's finding of no negligence on an alternate theory encompassed by the sudden emergency instruction.

III. *Sufficiency of the Evidence*

For the same reasons, Wiles contends the evidence is insufficient to support the verdict. She argues both Drs. Oudiz and Carstens testified that Jackson was negligent and at fault for the collision by virtue of his self-inflicted cut, which caused him to lose consciousness from vasovagal syncope. She maintains there is no contrary testimony from those experts' opinions that the pain from the cut was the stimulus for Jackson passing out. She argues both experts agreed Jackson's cutting himself "was the thing that put this whole thing in motion," thus an "independent review of that undisputed evidence should lead the court to conclude that Jackson caused the emergency by his own negligence and therefore should be denied the sudden emergency defense . . . ." According to Wiles, "[t]he only basis upon which the jury could have found Jackson not negligent for this collision would be to find that the sudden emergency defense . . . applied to Jackson."

We disagree with the latter contention given our conclusion above that the jury could have found Jackson not negligent on evidence of Jackson's sudden unanticipated

fainting spell while driving. We reject Wiles's other contentions, which are based on the same mischaracterization of Dr. Carstens's testimony. The evidence recounted above permitted the jury to conclude that Jackson was not negligent in cutting his own finger while using his knife, and that it was the reflex condition of vasovagal syncope over which Jackson had no control, not his act in cutting himself, that resulted in him losing consciousness. The record contains substantial evidence to support the jury's verdict that Jackson was not negligent.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.